

HONORABLE JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SCOTT AND KATHYRN KASEBURG,  
et al.,

Plaintiffs,

v.

PORT OF SEATTLE, a municipal  
corporation; PUGET SOUND ENERGY,  
INC., a Washington for profit corporation,  
KING COUNTY, a home rule charter  
county, and CENTRAL PUGET SOUND  
REGIONAL TRANSIT AUTHORITY, a  
municipal corporation,

Defendants.

No. 2: 14-CV-00784-JCC

SOUND TRANSIT'S REPLY RE:

CROSS-MOTION FOR PARTIAL  
SUMMARY JUDGMENT ON  
WHETHER CONSTRUCTION AND  
OPERATION OF LIGHT RAIL IS  
CONSISTENT WITH BNSF'S  
EASEMENTS

**NOTE ON MOTION CALENDAR:  
OCTOBER 9, 2015**

**ORAL ARGUMENT REQUESTED**

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IS CONSISTENT WITH BNSF'S EASEMENTS

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## I. INTRODUCTION

Sound Transit's cross motion asks the Court to rule that under Washington law, (1) light rail passenger service is a railroad purpose, and (2) the BNSF's railroad easements permit light rail facilities to be constructed below, above, or on the surface, as dictated by sound engineering practices and operational needs. Plaintiffs do not respond to the first issue, and concede the second with the following statement:

By and through a railroad purposes easement, a railroad acquires more than the mere right of passage over the land, it acquires the right to excavate drainage ditches, to construct various supports under the surface for bridges and other structures, and to construct signals and the like.

Dkt No. 131 at 7-8 (emphasis added).

Rather than respond to the two legal issues in Sound Transit's motion directly, Plaintiffs: (1) reargue whether BNSF's easements were preserved and available for use (an issue already decided by this Court in the affirmative<sup>1</sup>), and (2) argue, contrary to this Court's ruling that BNSF's easements were preserved, that because the Surface Transportation Board ("STB") exercises federal jurisdiction over freight rail operations, the state law property right to run passenger rail granted by the BNSF easement is somehow extinguished. Both of these non-germane arguments are legally flawed.

## II. ADDITIONAL FACTUAL BACKGROUND

### A. Other transit agencies have similar interests in railbanked corridors.

Sound Transit's passenger rail property interest in a railbanked corridor is not unique. Transit agencies across the country are using railbanked corridors or are considering them for future use in many locations, including: (a) commuter rail in Salt Lake City, Utah; (b) light rail and commuter rail in Dallas, TX; (c) light rail in Charlotte,

<sup>1</sup> See Dkt No. 107 (Order Granting Defendants' Motion for Partial Summary Judgment) at 10 ("BNSF's railbanking of the Eastside Rail Corridor preserved BNSF's railroad easements and allowed interim trail use of the corridor as a trail.").

1 NC; (d) commuter rail in Boise, ID; and (e) light rail in Sacramento, CA.<sup>2</sup>

### 2 III. EVIDENCE RELIED UPON

3 The declarations and documents already on file with this Court.

### 4 IV. ARGUMENT

5 Putting aside Plaintiffs' colorful hyperbole, Sound Transit's right to run passenger  
6 rail is firmly supported by the law. Plaintiffs' argument is generally as follows:

- 7 • Trail use and railroad use are mutually exclusive;
- 8 • The preserved easement can only be used for a railroad purpose if the STB  
9 reactivates the corridor for a freight railroad; and
- 10 • Sound Transit is not a railroad (as defined by STB jurisdictional  
11 requirements) and therefore cannot use the easement it purchased.

12 Each of these assertions is either legally or factually incorrect or incomplete.

13 First, numerous STB cases confirm that trail use and rail use are not mutually  
14 exclusive. Second, Plaintiffs ignore the distinction between freight rail and passenger  
15 rail, both of which were permitted by BNSF's railroad easements. The former is subject  
16 to STB substantive jurisdiction (and reactivation). The latter are created and governed by  
17 state property law, and the STB does not regulate them.<sup>3</sup> Third, the fact that Sound

18  
19 <sup>2</sup> See *Toscano v. U.S.*, 107 Fed. Cl. 179, 181-82 (2012) (Salt Lake City, Utah); *Regional*  
20 *Rail Right of Way Company – Abandonment Exemption – In Collin and Dallas Counties,*  
21 *TX*, 2010 WL 262221, STB Docket No. AB-1050X (January 25, 2010) (Dallas, Texas);  
22 *Norfolk Southern Railway Co. – Abandonment Exemption – In Mecklenburg County, NC*,  
23 *2004 WL 1136634*, STB Docket No. AB-290 (Sub-No. 247X) (May 21, 2004); *Union*  
24 *Pacific Railroad Co. – Abandonment and Discontinuance of Trackage Rights Exemption –*  
25 *In Ada County, ID*, 2000 WL 124964, STB Docket No. AB-33 (Sub-No. 137X) (February  
2, 2000) (Boise, Idaho); *Southern Pacific Transportation Co. – Abandonment Exemption*  
– *In El Dorado County, CA*, 1995 WL 314866, STB Docket No. AB-12 (Sub-No. 128X)  
(May 25, 1995) (Sacramento, CA).

<sup>3</sup> *The Baltimore and Ohio R. Co. – Abandonment and Discont. Of Ser. – In Montgomery*  
*County, MD and the Dist. of Columbia*, ICC Docket No. AB-19 (Sub-No. 112), 1990 WL  
287371, \*3 (Service Date March 2, 1990) (no regulatory responsibility over light rail on  
the railbanked easement).



Transit does not intend to operate a freight railroad subject to STB jurisdiction or reactivation is irrelevant. Under governing Washington law, light rail is a railroad purpose permitted by, and consistent with, BNSF's easements that this Court has already ruled were preserved.

**A. Plaintiffs concede that the “after” condition for takings compensation they were awarded in *Haggart* specifically included compensation for the construction of light rail.**

In Plaintiffs' opposition to the Port's and King County's motion, Plaintiffs rely on declarations from two experts. *See* Dkt Nos. 131-3 and 131-4. In one of those declarations, their expert's recital of *Haggart*'s appraisal instructions is dispositive:

In the “after” condition, Plaintiffs parcels will be valued subject to the present encumbrance – an easement for recreational trail use subject to possible reactivation as a railroad, including light rail, pursuant to [the Trails Act]...”

*See* Dkt No. 131-4 at 6 (Declaration of John A. Kilpatrick)(emphasis added).

That conclusion is further supported by this Court's recent ruling in *Ioppolo v. Port of Seattle, et al.*, C15-0358-JCC, Dkt No. 56, where this Court recognized that Plaintiffs have been fully compensated for any proposed uses exceeding BNSF's original easements. *See Id.* at 4 (“In other words, in *Haggart*, members of the class of named and opt-in plaintiffs were compensated for the fact that the conveyance by BNSF pursuant to the Trails Act exceeded the preexisting scope of the easement...” ) and 7 (“...the *Haggart* Court made no mention of a limitation with respect to surface rights as opposed to subsurface or aerial rights. In sum, to the extent that the conduct of the Port of Seattle and remaining Defendants King County and Sound Transit may have rightfully been construed as a ‘taking,’ Plaintiffs have already received just compensation for that taking.”)(internal citation removed, emphasis added). This compensation for uses that exceed the original easement would undoubtedly encompass Sound Transit's passenger

1 rail use that is part and parcel to BNSF's original easement (and which was expressly  
2 included by the *Haggart* court and the appraisers, regardless).

3 Plaintiffs' continued argument that Sound Transit cannot construct light rail when  
4 Plaintiffs received compensation for that right is untenable.

5  
6 **B. Trail use and rail use are not mutually exclusive; a railbanked corridor  
may be used for any purpose consistent with the original easement.**

7 Trail use does not exclude passenger rail or any other use permitted by the original  
8 easement and vice versa.<sup>4</sup> The STB has previously not precluded construction of light rail  
9 on a railbanked easement also used as a trail. *The Baltimore and Ohio R. Co. –*  
10 *Abandonment and Discont. Of Ser. – In Montgomery County, MD and the Dist. of*  
11 *Columbia*, ICC Docket No. AB-19 (Sub-No. 112), 1990 WL 287371, \*2 (Service Date  
12 March 2, 1990) (“Coalition has not demonstrated that County’s transitway [light-rail]  
13 proposal is incompatible with either trail use or the restoration of service” and referencing  
14 another decision allowing tourist train). *See also CSX Transp., Inc. – Abandonment*  
15 *Exemption – In Monroe and Owen Counties, IL*, STB Docket No. AB-55 (Sub-No, 514X),  
16 1997 WL 598035, \*1 n.5 (“Nothing in the statute or our regulations precludes a right-of-  
17 way from being used for mixed highway (or light rail) and recreational use.”).

18 Numerous STB decisions have “allowed dual uses of trails,” including uses “of the  
19 right-of-way as both a trail and a utility corridor . . . .” *Kansas Eastern RR, Inc. –*

20  
21 <sup>4</sup> In the rulemaking process, the ICC (now STB) stated, “we see no reason why the  
22 development of non-trail activities or structures on or around the right-of-way should be  
23 restricted, as long as they are consistent with interim trail use, rail banking, and future  
24 restoration of rail service.” *Rail Abandonments-Use of Rights-of-Way As Trails*, 2  
25 I.C.C.2d at 606-07 and 608. This conclusion was reemphasized in subsequent rulemaking  
updates. STB, *Rail Abandonments—Use of Rights-of-Way As Trails—Supplemental*  
*Trails Act Procedures*, Ex Parte No. 274 (Sub-No. 13), 1989 WL 238631 at \*5 n.10  
(decided May 18, 1989) (“If the rail carrier’s interest allows different uses (such as  
underground cable) we see no reason why a trail operator should not be able to do the  
same. The reversionary property owner’s position has not changed.”).



1 *Abandonment Exemption – In Butler and Greenwood Counties, KS*, STB Docket No. AB-  
 2 563 (Sub-No. 1X), 2006 WL 1516602, \*3 (Service Date June 1, 2006); *T and P Railway –*  
 3 *Abandonment Exemption – In Shawnee, Jefferson and Atchison Counties, KS*, STB  
 4 Docket No. AB-381 (Sub-No. 1X), 1997 WL 68211, \*5, \*7 n.16 (Service Date Feb. 20,  
 5 1997), *rev'd on other grounds, Becker v. Surface Transp. Bd.*, 132 F.3d 60 (1997) (use of  
 6 the right-of-way by Western Resources for utility transmission lines did not result in  
 7 rescinding a NITU and could provide a source of funds for maintenance); *KCT Railway*  
 8 *Corp. – Abandonment Exemption – In Franklin, Anderson, and Allen Counties, KS*, ICC  
 9 Docket No. AB-335 (Sub-No. 2X), 1992 WL 311582, \*1-\*2 (Service Date Oct. 26, 1992)  
 10 (accepting use of a railbanked corridor for street extension).;

11 Plaintiffs' argument that trail use is mutually exclusive of all other permitted uses  
 12 and vice versa is plainly incorrect.

13 **C. Plaintiffs ignore the underlying property transactions, the STB's**  
 14 **supervisory role in them, and the limitation of the STB's jurisdiction to**  
 15 **freight railroad only.**

16 Sound Transit owns a high capacity transportation easement over Plaintiffs'  
 17 property that permits light rail.<sup>5</sup> Without explanation, Plaintiffs ask this Court to throw  
 18 out the underlying property transactions and pretend they never occurred. The end result  
 19 would be the extinguishment of the property right to run passenger rail in the corridor  
 20 even though it was conveyed to the Port by BNSF and subsequently sold to Sound Transit.

21 The STB routinely recognizes a railroad's ability to split its easement property  
 22 rights into the component freight and passenger rail rights and to transfer the latter to a  
 23 third party. In *Toscano v. U.S.*, 107 Fed. Cl. 179 (2012), the Union Pacific Railroad sold  
 24 its railroad easement to the Utah Transit Authority ("UTA"), but retained an exclusive

25 <sup>5</sup> A copy of the high capacity transportation easement was attached to Plaintiffs' Third Amended Complaint (Dkt No. 83, Exh. L).

1 freight easement for itself. *Id.* at 181. “In effect, Union Pacific split its interest in two: it  
 2 transferred to UTA the entire easement along with physical improvements it had built,  
 3 including the right to operate ‘possible’ passenger service, but it retained for itself the  
 4 right to conduct a freight line...” *Id.* at 181-82. This process of splitting freight and  
 5 passenger easement rights and obtaining a ruling that the transaction is not subject to STB  
 6 jurisdiction is commonly referred to as a ‘State of Maine transaction,’ named after the  
 7 state in which a ruling by the ICC (now STB) first endorsed the practice. *Id.*

8       These decisions demonstrate that the STB is not concerned with and does not  
 9 regulate passenger rail. The scope of the Sound Transit easement is solely governed by  
 10 Washington property law, and the interaction of Sound Transit’s state law property rights  
 11 with STB jurisdiction is limited: if/when the STB approves **freight** reactivation, Sound  
 12 Transit’s light rail will have to be relocated or removed to the extent light rail interferes  
 13 with the freight rail. There is nothing in this regulatory framework that prevents light rail  
 14 use of the former BNSF railroad easements while the corridor is railbanked prior to any  
 15 reactivation.

16       **D. Sound Transit can construct and operate passenger rail without STB**  
 17 **approval because the STB has no jurisdiction over passenger rail.**

18       Even though Sound Transit owns easement rights to operate passenger rail  
 19 throughout the corridor, Plaintiffs assert that STB approval is required to construct it.  
 20 STB approval is not required because, as Plaintiffs note, passenger rail operated by a local  
 21 government is specifically excluded from STB jurisdiction [*see*, 49 USC §  
 22 10501(c)(2)(A)] and is instead a matter of state law property rights.

23       STB decisions confirm that the STB does not regulate non-freight interim uses of a  
 24 railbanked corridor, and that the STB does not require operators to seek its approval to run  
 25

1 passenger rail. In *Baltimore and Ohio*<sup>6</sup>, the trail sponsor allowed part of the railbanked  
 2 corridor to be used for light rail. Alleging that light-rail would interfere with the  
 3 recreational trail and make it impractical to resume freight service, plaintiffs asked the  
 4 STB to either prohibit light rail use or to vacate the certificate allowing the trail use. The  
 5 STB did neither. Instead the STB ruled that it did not have the authority to regulate the  
 6 use of the right-of-way or "police trail use agreements."<sup>7</sup> The STB dismissed the petition  
 7 and explained that its authority is limited to ensuring that the trail sponsor assumes legal  
 8 and financial responsibility for the right-of-way and agrees to maintain it so that it can be  
 9 restored and used for railroad purposes.<sup>8 9</sup> The track can be removed and changes can be  
 10 made to the right-of-way to permit other uses "...so long as the property remains available  
 11 for reactivation of rail service."<sup>10</sup> "While we retain jurisdiction over the right-of-way to  
 12 ensure that the statutory criteria are met, we have no other regulatory responsibilities over  
 13 the interim [light rail] use of the property."<sup>11</sup>

14 If a third party were to challenge Sound Transit's proposed light rail use (as  
 15 happened in *Baltimore and Ohio*), the sole question for the STB under the Trails Act  
 16 would be whether Sound Transit's proposed light rail use precludes possible restoration of  
 17 freight service. Because Sound Transit's high-capacity easement rights are expressly  
 18

19  
 20 <sup>6</sup> *Baltimore and Ohio R. Co. – Abandonment and Discont. Of Ser. – In Montgomery*  
 21 *County, MD and the Dist. of Columbia*, 1990 WL 287371, ICC Dkt. No. AB-19 (Sub-No.  
 112) (February 22, 1990) ("*Baltimore and Ohio*").

22 <sup>7</sup> *Id.* at 3.

23 <sup>8</sup> *See*, 16 USC §1247(d); 49 CFR §1152.29

24 <sup>9</sup> *See*, STB Notice of Interim Trail Use issued to King County, Dkt No. 46, Exh. B.

25 <sup>10</sup> *Gnp Rly, Inc.--Acquisition & Operation Exemption--Redmond Spur & Woodinville*  
*Subdivision*, 2011 WL 2421150, Fin. Dkt. No. 35407, at \*3 (June 15, 2011) (installation  
 of sewer trunk line); 49 C. F. R. § 1152. 29(a)(3); 1152. 29(d)(1)

<sup>11</sup> *Baltimore and Ohio R. Co.*, 1990 WL 287371 at \*3.

1 subject to the right to operate freight service in the right-of way,<sup>12</sup> the STB would dismiss  
 2 the petition without ruling because it has “never asserted jurisdiction over the ability of  
 3 railroads to allow non-carriers to conduct non-jurisdictional activities, such as rail  
 4 commuter service, on their excess real estate when regulated [freight] rail service will not  
 5 be affected thereby.” *S. Pac. Transp. Co.-Abandonment Exemption-Los Angeles Cnty.,*  
 6 *Ca.*, 1993 WL 54669, 91 I.C.C.2d 385, 390 (Feb. 12, 1993).

7 Another important aspect of the decision is what the STB did not do in *Baltimore*  
 8 *and Ohio*. A Trails Act regulation directs the STB to vacate the certificate allowing  
 9 interim trail use if a railroad files a request to use the right-of-way.<sup>13</sup> Even though the  
 10 corridor was to be used for a railroad purpose (light rail), the STB neither vacated the trail  
 11 use certificate nor invoked the regulations to direct the parties to return at the appropriate  
 12 time to vacate the trail use and seek approval to operate light rail.<sup>14</sup> Instead, the STB  
 13 dismissed the petition knowing that light rail would be constructed and coexist with the  
 14 trail use. The STB could resolve the case by dismissal without any reference to vacating  
 15 the interim trail use only if STB approval is not required to operate passenger rail. The  
 16 ruling makes clear that the operation of passenger rail is determined by the agreements  
 17 between the owner of the easement rights and the trail sponsor, not by the STB, and are a  
 18

19 <sup>12</sup> See High Capacity Transportation Easement (Dkt. No. 83, Exhibit L, Section 5(B)).

20 <sup>13</sup> See, 49 CFR §1152.29(c)(3) and (d)(3).

21 <sup>14</sup> The STB likely did not reference 49 CFR §1152.29(c)(3) and (d)(3) because the  
 22 regulations necessarily only apply to rail carriers engaged in freight operations subject to  
 23 the STB’s jurisdiction. The failure to reference the regulations in connection with a case  
 24 involving passenger rail reflects the STB’s practice of not exercising jurisdiction over  
 25 passenger rail. Unless freight operations subject to STB jurisdiction are implicated, the  
 STB takes no action, including not acting to vacate a trail certificate. Had the proposed  
 use been by a freight railroad, the STB would have been required by the regulations to  
 vacate the trail use, to the extent such trail use was inconsistent with the freight railroad  
 operations. See, *Georgia Great So. Division – Aban. & Discon. Of Service*, STB 2003 WL  
 21132515, Dkt. No. AB-389 (Sub-No. IX) (May 9, 2003) (vacating trail use for freight  
 reactivation).

1 function of state law interpretation of the easement rights.

2 In this case, Sound Transit (easement owner) and King County (trail sponsor) have  
3 agreed how and where passenger rail and freight rail can operate in the right-of-way. This  
4 Court should adopt the STB's consistent position that STB approval is not required to  
5 operate passenger rail on railbanked right-of-way.<sup>15</sup>

6 Plaintiffs' argument that STB approval is required also conflicts with the STB's  
7 many "State-of-Maine" rulings that it lacks jurisdiction over the transfer and use of  
8 property rights whose only impact is to permit local governments to use railroad right-of-  
9 way to operate passenger rail.<sup>16,17</sup> Because the STB does not have jurisdiction over  
10 passenger rail operated by a local government, and because the STB dismisses petitions  
11 seeking its approval, the Court should reject Plaintiffs' arguments.

12  
13 <sup>15</sup> See also *Thomas v. U.S.*, 106 Fed. Cl. 467, 488-89 (2012). In *Thomas*, the railroad  
14 retained the right to reinstitute passenger rail service, but such rights were contractually  
15 subordinate to the trail user's trail rights. The *Thomas* court stated "CSXT's transfer of  
16 the corridor affirmatively precludes [passenger] railroad operations along the corridor  
17 without permission of the non-railroad third party trail operator should these operations  
18 interfere with trail use, or until the STB, under the Trails Act, decides to reactivate rail  
19 service, abandon the property, or otherwise exercise its jurisdiction over the corridor."  
20 This statement recognizes that passenger rail service can be activated without STB  
21 authorization and is a function of the property rights between the trail operator and the  
22 entity holding the passenger rail rights.

23 <sup>16</sup> See, *State of Maine, Dep't of Transp.-Acquisition & Operation Exemption-Maine Cent.*  
24 *R.R. Co.*, 1991 WL 84430, 8 I.C.C 2d 835 (May 20, 1991)(no jurisdiction over sale of  
25 property right to government for commuter rail operations if railroad retains common  
26 carrier freight rights and obligations). *Los Angeles Cnty. Transp. Comm'n—Petition for*  
27 *Exemption--Acquisition from Union Pac. R.R. Co.*, 1996 WL 408632, STB Fin. Dkt. No.  
28 32374, at \*4 (July 11, 1996) (no jurisdiction over sale of property rights to operate  
29 commuter rail where no interference with common carrier rights and obligations); *State of*  
30 *Wisconsin Dep't of Transp.-Petition for Declaratory Order*, 2002 WL 1767404, STB Fin.  
31 Dkt. No. 34181, at \*2 (July 30, 2002).

32 <sup>17</sup> In *Haggart v. U.S.*, 108 Fed.Cl. 70, 96 (2012), Judge Lettow also understood the STB's  
33 limited role by distinguishing "future railway use by way of reactivation" for freight from  
34 "possible future development of a commuter rail line." Had freight and passenger rail not  
35 been unique, there would have been no need to separately identify them.



**E. Plaintiffs' failure to distinguish between passenger rail and freight rail results in a logically and legally flawed argument.**

On pages 7 - 11 of Plaintiffs' Opposition (Dkt No. 133), Plaintiffs' selective compilation of partially true premises leads to a false conclusion. Plaintiffs argument is summarized as follows, with clarification of each premise included in a sub-bullet:

- "Railbanking is merely a provision allowing the maintenance of federal jurisdiction over a railroad right of way under the Trail Act upon issuance of a NITU." Dkt No. 133 at 8:11-12.
  - Railbanking preserves the railroad easements for future use according to the easement terms. The STB maintains jurisdiction over **freight** rail reactivation – **passenger** rail use is expressly exempted unless it precludes the reactivation of freight service. *See Baltimore and Ohio*, Section D above.
- "In order to reactivate a railbanked corridor, a bona fide railroad must petition the STB and request reactivation..." Dkt No. 133 at 8:19-20.
  - This is only to true as to **freight** rail reactivation. See Sections C and D, above.
- "Sound Transit is simply not a railroad, is not a bona fide petitioner, and cannot reactivate this railbanked corridor. Even if Sound Transit were able to somehow obtain the STB's approval to reactivate the railbanked corridor, then the NITU would be revoked and the abandonment proceedings would be reopened." Dkt No. 133 at 9:15-18.
  - Because Sound Transit will not operate a **freight** railroad, its status as a bona fide railroad is irrelevant. Sound Transit's right to build passenger rail is based on its state law easement rights which are not subject to STB jurisdiction. The STB can exercise jurisdiction and reopen NITU proceedings only if a freight railroad seeks to use the easement.
- "In *Kulmer v. STB*, 236 F.3d 1255 (10<sup>th</sup> Cir. 2001), the Tenth Circuit upheld the STB's decision to dismiss an OFA from a light rail developer whose OFA did not include evidence that continued freight service would likely result from their proposal." Dkt No. 133 at 10:1-9.
  - *Kulmer* is not a railbanking case. The case involved a private light rail operator seeking STB approval of an involuntary sale of a railroad



proposed to be abandoned and converted for light rail use by the railroad that owned the line. Both the petitioning private light rail operator and the original railroad intended to convert the line to light rail use. Because the petitioner did not prove that it was more likely to preserve the corridor for freight than the original owner, the STB denied the petitioner's request. It is true that preservation of the corridor for freight was the STB's primary concern, but the case has no bearing on whether a passenger rail easement owner can use a railbanked corridor for passenger rail service or whether the STB has any jurisdiction over passenger rail.

- Sound Transit did not initiate STB proceedings seeking STB approval of light rail use (Dkt No. 133 at 10:10-18.), and "the STB has not given its approval that such use would not interfere with the possibility of the corridor being reactivated for railroad purposes." Dkt No. 133 at 10:19-20.
  - This is a *non sequitur*. As noted, the STB has no jurisdiction over passenger rail service; it routinely dismisses cases related to the topic (see *State of Maine* discussion, Section C above). See also *Baltimore and Ohio*, Section D above.
- "Thus, Sound Transit's intended use is outside the scope of the federally-approved use of the land. If Sound Transit [] wishes to establish a light rail, an entirely new proceeding would have to be formally initiated by King County, through the STB." Dkt No. 133 at 10:20 – 11:1.
  - The STB lacks regulatory jurisdiction over Sound Transit's passenger rail use, which is actually governed by easement rights under Washington law. The STB's lack of jurisdiction over passenger rail use does not destroy the state law rights associated with the right to operate passenger rail. Thus, no STB proceeding is required.

## V. CONCLUSION

Plaintiffs have not opposed and concede that under Washington law: (1) light rail passenger service is a railroad purpose consistent with BNSF's easements, and (2) BNSF's railroad easements permit light rail facilities to be constructed below, above, or on the surface, as dictated by sound engineering practices and operational needs. Accordingly, the Court should grant Sound Transit's cross motion.

Additionally, the non-germane arguments raised by Plaintiffs are based on false

(or incomplete) premises that result in the faulty conclusion that STB approval is required to construct and operate passenger rail in the corridor. The STB has often recognized a railroad's ability to separate and sell its freight rail and passenger rail rights, and the STB has frequently acknowledged its statutory lack of regulatory jurisdiction over passenger rail (and other non-freight uses permitted by the scope of the original easements) in a railbanked corridor. Thus, Plaintiffs have failed to provide any basis on which this Court should deny Sound Transit's Cross Motion.

Dated October 9, 2015 at ~~Seattle~~ Washington

By: 

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#### CERTIFICATE OF SERVICE

I do hereby certify under penalty of perjury under the laws of the State of Washington that on October 9, 2015, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all parties of record:

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SOUND TRANSIT'S REPLY RE: CROSS-MOTION FOR  
PARTIAL SUMMARY JUDGMENT ON WHETHER  
CONSTRUCTION AND OPERATION OF LIGHT RAIL  
IS CONSISTENT WITH BNSF'S EASEMENTS - 12

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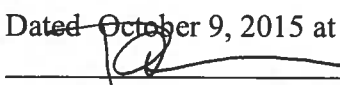
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